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Supreme Court, U.S.
FILED

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No. _____

OFFICE OF THE CLERK

# *In the*
# *Supreme Court of the United States*

Margaret Zavalidroga and Tomas Zavalidroga,
Petitioners, pro se

vs.

Joseph S. Cote, Individually, John Doe, Doris M. Kelley, James E. Kelley, David LaPlante, Individually and Officially as an Oneida County Sherriff's Deputy, Gregory J. Amoroso, Individually and Officially, Town of Annsville, a municipal entity,
Respondents

On petition for Certiorari to the United States Court of Appeals for the Second Circuit

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED FOR REVIEW

The Court of Appeals Second Circuit affirmed the dismissal of the pro se Petitioners' Complaint citing a lack of factual plausibility in the pleadings pursuant to the Supreme Court's rulings in Bell Atlantic v Twombly and Ashcroft v Iqbal. This was a defense the Respondents, who had never challenged the validity of the facts of the case in the District Court proceedings, presented for the first time on appeal, and which the Second Circuit itself furthered by employing its assumed power to "affirm a decision on any grounds supported in the record, even if it is not one on which the trial court relied." In its decision, the Second Circuit also ignored the Petitioner's 14th Amendment – based recusal motion and Petitioners' "duty to protect " and "reasonableness" causes of action against Respondent, Sheriff's Deputy David LaPlante.

Did the Respondents and the Court of Appeals misconstrue the reach of Twombly and Iqbal by citing them against the Petitioners' pro se Complaint and failing to employ the "two part" analysis these precedents demand?

Did the Court of Appeals violate the Petitioners' 14th Amendment right to due process when it broadened de novo review to include affirmation of the District Court decision on new, substitute grounds and allowed the Respondents to put forth new claims and defenses for the first time on appeal?

Would a State's statuary law limiting the right of self defense of property or person change the conclusions reached by the Court in Deshaney v Winnebago County

Department of Social Services and Castle Rock v Gonzales regarding the duty of Police to protect?

In light of the Court's recent ruling in Caperton v Massey, should tribunals now have to consider recusal motions on the basis of the 14th Amendment itself, apart from Section 455 considerations?

Did the Court of Appeals misstate the proper elements of a civil RICO claim?

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## PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals Second Circuit were : The Petitioners, Margaret and Tomas Zavalidroga, who jointly appealed to the Court of Appeals through a consolidated appeal, and hereby appeal in the same fashion. The Defendants were: Joseph S. Cote; John Doe, representing an unknown conspirator; Doris M. Kelley; James E. Kelley; David LaPlante and the Town of Annsville.

## DECISIONS BELOW

The January 19, 2010 Order and Judgment of United States District Court of N.Y. judge, David N. Hurd dismissing Plaintiffs-Petitioners' Complaint. The October 6, 2010 Order of the Court of Appeals Second Circuit (judges, Pooler, Kravitz and Hall. )

## JURISDICTION

The jurisdiction of this court is based on 28 USC 1254 in that Petitioners appeal from a final decision of a United States Court of Appeals.

## CONSTITIONAL PROVISIONS AND STATUTES

The Petitioners brought their District Court action pursuant to 42 U.S.C. sections 1981, 1983, 1985, 241-242, 28 U.S.C. 1367; and 18 U.S.C. 1961-1968 ( RICO of 1970 )

and the 14th Amendment of the Constitution. Petitioners brought a Recusal Motion in the Court of Appeals pursuant to Section 455 and the 14th Amendment.

## STATEMENT OF THE CASE

The Petitioners initially brought this action to the District Court in February 2009 as a means to redress an ongoing civil rights conspiracy involving the Respondents-Defendents. Petitioners Zavalidrogas alleged that the Respondents- Defendants had over a period of nearly a decade, engaged in unlawful conduct which included illegal development, assaults, vandalism, theft, legal malpractice and violations of many Federal anti-corruption statutes in a conspiratorial effort to exhort property from the Zavalidrogas and also to punish them for having brought this conspiracy to the attention of State and Federal authorities.

The Zavalidrogas also alleged that beginning in 2004, the Respondents-Defendants had conspired to bring a rigged legal action against them in State Court in an effort to further deprive the Zavalidrogas of their rights and property.

As part of their District Court action, the Zavalidrogas brought a Section 1981 claim alleging that racial animus predicated the civil rights conspiracy in that Respondents-Defendants Kelleys, neighborhood landowners who are of Irish-American ethnicity, were being favored and assisted by an inordinate number of Irish-American state actors to the detriment of the Eastern European Zavalidrogas. In addition to the Kelleys, Defendants in the District Court action included the Zavalidroga's own attorney in the State

action, Joseph Cote; The Kelleys' attorney, Gregory Amoroso; John Doe, who represented an unknown conspirator; David LaPlante, a Sheriff's Deputy who assisted the Kelleys by unlawfully harassing the Zavalidrogas and depriving the Zavalidrogas of normal police protection; and the Town of Annsville, which assisted the conspiracy but was eventually removed as a defendant as a result of a settlement.

In the course of the Federal District Court action, the Respondents-Defendants Cote and Town of Annsville brought several motions to dismiss on the basis of Fed. Rule of Civ. Procedure 12(b) (6) (1), citing a lack of subject matter jurisdiction. The Respondents also cited Rule 9 (b) arguing that the Petitioners had failed to plead with specificity. The Petitioners filed a cross-motion to amend. Neither the Respondents nor the District Court had ever challenged the veracity of the Petitioners' numerous factual assertions, many of which took the form of affidavits, police Complaints and implicating letters from the respondents themselves. Notably, Respondents Kelleys, amoroso and LaPlante and their attorneys remained absent from the District Court proceedings except for their initial Answers to the Petitioners' Complaint.

On January 19, 2010, the District Court dismissed Petitioners' Complaint, citing a lack of subject matter jurisdiction and frivolity of the Petitioners' claims. The Petitioners' Motion to Amend was dismissed as moot, and their State law malpractice claims were also similarly dismissed.

While the action was under appeal in the Second Circuit, all of the remaining Defendants, including the Kelleys, Amoroso and Laplante, all absent from the district Court proceedings, filed briefs in reply to the Petitioners' appellate brief. All of the Respondents in their appellate briefs put forth a new argument for the first time on appeal based on the plausibility standard promulgated in Bell Atlantic v Twombly and Ashcroft v Iqbal.

At oral argument in the 2nd circuit, the Petitioners submitted an emergency Motion requesting the recusal of presiding 2nd circuit Justice Rosemary Pooler, who the Petitioners alleged, had been a law professor at Syracuse University, the same institution at which Respondent Cote and his wife are currently law professors. The Petitioners also alleged a number of common political, social and professional relationships between Judge Pooler and the Respondent Cote.

Also at the 2nd Circuit oral argument, attorneys for Respondents LaPlante and Kelleys put forth the same argument which the District Court relied on that the Federal courts lacked subject matter jurisdiction over the action. This argument was rejected by the presiding 2nd Circuit panel.

On October 6, 2010, the 2nd circuit issued a Summary Order affirming the District Court's judgment but on different grounds than those cited by the District Court. Largely citing the authority of Bell Atlantic v Twombly and Ashcroft v Iqbal, the 2nd Circuit opined the Petitioners' First amended Complaint and RICO statement "failed to plead enough facts to state a claim to relief that is plausible on its Face" and generally stated no Federal claims, and that the District Court did not err by denying the pro se Zavalidrogas an opportunity to another amended complaint. The Court also rejected the Petitioners' Recusal Motion by ignoring Petitioners' 14th Amendment due process argument altogether.

## REASONS WHY CERTIORARI SHOULD BE GRANTED

### THE 2ND CIRCUIT DECISION MISCONSTRUED THE PROVISIONS OF TWOMBLY AND IQBAL IN ASSESSING A PRO SE COMPLAINT THEREBY VIOLATING THE RECENT AUTHORITY OF THIS COURT AND VIOLATING THE 2ND CIRCUIT'S OWN RULINGS.

Bell Atlantic v Twombly and Ashcroft v Iqbal may be the most significant developments in American jurisprudence in many years. These two cases have now been cited in hundreds of Federal Court of Appeals dismissals, a good many of them dismissals of pro se Complaints. Recent studies have indicated that the percentage of pro se actions ending in dismissal has risen from approximately 69% before the advent of Twombly to about 85% after Iqbal's appearance, and most of these pro se dismissals are without leave to amend.

However, this Court in Erickson v Pardus, 551 US 90, (2007), shortly after the issuance of the Twombly decision, ruled that, "a pro se Complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers," especially when dismissal is contemplated. The Court in Erickson also explicitly stated that "specific facts are not necessary" for a claim to comply with federal Rule 8 (a). The 2nd Circuit itself in Dippeto v. U.S. Postal Service, No. 09-03202-cv, 2nd Cir. (2009) similarly ruled: "We recently addressed the application of Ashcroft v. Iqbal, 129 Sect. 1949 (2009), to pro se pleadings and noted that, even after Bell Atlantic Corp. v Twombly, 550 US 544 (2007), we remain obligated to construe a pro se Complaint liberally." The Second Circuit in Hemphill v Schott, 141 F.3d 412 (1998) also ruled that pro se Motions to Amend should be freely afforded: "Because there is no "apparent or declared reason-such as undue delay, bad faith or dilatory motive... repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by

virtue of allowance of the amendment, "leave to amend should be "freely given"." (Foman v Davis, 371 US 178

Nonetheless, a few months after Dippeto, the 2nd circuit departed from these established rules and dismissed Petitioners Zavalidrogas' fact-laden pro se Complaint. Further, the Second Circuit appears to have ignored the two-part claim assessment standard the Supreme Court put forth in Iqbal:

"Two working principles underlie Twombly. First, the tenet that a Court must accept a Complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements. Id at 555. Second, determining whether a Complaint states a plausible claim is context-specific, requiring the reviewing Court to draw on its experience and common sense Id. At 556. A court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the complaint's framework, they must be supported by factual allegations. When there are well pleaded factual allegations, a Court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."

It is clear that there is still confusion within 2nd Circuit as to the proper application of Twombly and Iqbal, in light of the grotesquely inconsistent results these two cases have caused. The Supreme Court in Twombly was aware of the possibility of such a malignant subjectivity enveloping the lower courts when it include the following advisory in its opinion: "In reaching this conclusion, we do not apply any 'heightened' pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished by amending the Federal Rules, and not by judicial interpretation." (citing Sienkiewicz v Sorema N.A., 534 US 506, 515 (2002) and quoting Leatherman v Tarrant County, 507 US 163 (1993).)

As the Petitioners argued in the District Court, the pleading standards set forth in Swierkiewicz, in which the Supreme Court held that the pleading of specific facts was not necessary to establish a prima facie case of discrimination, is controlling with regard to the Petitioners' claims.

**THE 2ND CIRCUIT'S REJECTION OF THE GROUNDS OF THE DISTRICT COURT DECISION, AND ITS IMPOSITION OF DIFFERENT, NEW GROUNDS IN AFFIRMING THE LOWER COURT DECISION IS A PRACTICE WHICH IS ALIEN TO TRADITIONAL AMERICAN JURISPRUDENCE AND VIOLATES THE PETITIONERS' RIGHT TO PROCEDURAL DUE PROCESS.**

By rejecting the grounds on which the District Court based its decision (lack of subject matter jurisdiction), and substituting its own grounds of affirmance, the 2nd Circuit has created the judicial equivalent of the Washington's axe conundrum: The Court of Appeals changes the head and handle of the District Court's decision, but It's still a valid District Court decision. The question is, can the Court of Appeals' authority to undertake a de novo review of the District Court record allow it to reject the grounds of an admittedly wrong District Court decision and then affirm said decision "on any grounds supported in the record, even if it is not one on which the trial court relied." and do so without violating the appellants' right to due process? The Petitioners maintain it cannot.

Interestingly, although Petitioners could find no evidence of this practice of opinion substitution in the federal Appeals Courts prior to the 1980's, it has recently become deeply rooted in virtually all the Federal Circuits, with the notable exception of the third circuit. (Le v Cheesecake Factory restaurants, Inc. No. 06-20006, 5th Cir., (2007); Koziara v City of Casselberry, 392 F.3d 1302, 11th Cir. (2004); Thyroff v nationwide Mut. Ins. Co., 460 F.3d 400, 2nd Cir.

(2006).

Within the last decade, the 2nd circuit has affirmed dozens of District Court decisions by means of these "theory" of law. The 2nd Circuit in Herrera v Pataki, 232 F, 3d 321 (2000), appears to have taken the practice to absurd levels in its opinion: "The District Court in the present case did not address the merits of Defendant's rule 12 B 6 motion and appears to have dismissed the Complaint solely on the ground that Herrera did not respond to the motion. Dismissal on that basis was error. This Court, however, is "free to affirm an appealed decision on any ground which finds support in the record, regardless of the ground upon which the trial court relied."....."

Accordingly, we turn to the question of whether Herrera's Complaint stated a claim on which relief can be granted.'

The Petitioners Zavalidrogas contend that this claimed authority to recast decisions has resulted in equally absurd results with regard to their own appeal to the Second Circuit, necessitating intervention by this Court. Obviously, the Appellate Courts have it taken upon themselves to broaden their powers of review to the point at which basic constitutional guarantees of equal protections and due process are at risk. The Federal Courts of Appeals must not be allowed to become advocates for one party or the other by speculating facts and arguments that have not been made in the lower proceedings. (see Singleton v Wulff, 428 US 106 120 (1976) (Virgilio v City of new York, 407 F 3d 105, 116, 2nd Cir. (2005); Cherry v City of New York, docket No. 09-2581-cv, 2nd Cir. (2010).

**THE SUPREME COURT SHOULD REVIEW THE DISMISSAL OF PETITIONERS' CLAIMS AGAINST RESPONDENT SHERIFF'S DEPUTY DAVID LAPLANTE IN THE CONTEXT OF THE COURT'S OWN PRECEDENTS AND ALSO IN THE CONTEXT OF PRIOR 2ND CIRCUIT AUTHORITY**

The 2nd Circuit dismissed the Petitioners' claims

against Respondent Sheriff's Deputy David Laplante on the basis that "the allegations against him did not state a constitutional deprivation." review of this dismissal by the Supreme Court is warranted for two reasons. First, the dismissal on this basis blatantly conflicts with the prior authority of the Second Circuit, and secondly, an aspect of the Petitioners" claims have not yet been tested by the Supreme Court and are of great importance nationally.

Petitioners based their claims against Laplante by authority of 14th Amendment substantive due process but thus invoked separate theories of liability. Primarily, Petitioners brought their claims pursuant to the rulings of the 2nd Circuit in Dwares v City of New York, 985 F.2d 94 (1993), which held that a state actor who aids and abets a private party in subjecting a citizen to unwarranted physical harm is liable under substantive due process grounds. Petitioners Zavalidrogas however, further claimed that an aspect of their injuries resulted from LaPlante's and his confederates' failure to provide normal police protection to the Zavalidrogas, while New York State's statutory laws limiting self-defense of person or property suppressed the Zavalidrogas' ability to engage in self help. The Zavalidrogas found themselves in a constitutionally impermissible position in which LaPlante and other conspirators were depriving the Zavalidrogas of police protection and then arresting them, or threatening to arrest them, if the Zavalidrogas engaged in self-defense.

The Petitioners contend that under circumstances where a State has limited self-defense of person or property through statutory law (duty to retreat laws), a proprietary right to police protection is created. Of course this theory was not considered in prior supreme Court rulings in DeShaney v Winnebago County Dep't of Soc. Servs., 489 US 327 (1989) and Castle Rock v Gonzales, 545 US 748 (2005), but there are now many actions similar to the petitioners' pending in New York's State and Federal courts, and it would be instructive if the Supreme Court could revisit its earlier rulings in the context of new theories of liability.

## THE RESPONDENTS' RICO CLAIM WAS DECIDED IN A MANNER WHICH CONFLICTS WITH 2ND CIRCUIT PRECEDENTS AND SUPREME COURT RULINGS.

The 2nd Circuit ruled the Petitioners Zavalidrogas failed to state a claim under RICO and that Petitioners, "failed to allege sufficient facts constituting a pattern of racketeering activity." the Court proffered a rote recitation of RICO's elements:" (1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) and 'enterprise' (7) the activities of which affect interstate or foreign commerce".

Again, the 2nd Circuit failed to objectively assess the Petitioners' RICO Statement pursuant to the two part assessment demanded by the provisions of Twombly and Iqbal. Beyond this, the 2nd Circuit failed to consider its own recent interpretation of Rico as stated in Top of the World Estates v Bernas, 244 F.3d 286, 2nd Cir. (2001):

"The trial Court's instruction with respect to extortion as a RICO predicate act was as follows: Extortion is the obtaining of property or anything of value from another person with his consent, when that consent is induced or caused or brought about by the wrongful use of force, violence or fear of physical injury or economic harm and loss.

The word property includes money and any valuable right considered to be a source or element of wealth. It is no limited to physical or tangible property or things. In this case property includes money and payment for unwanted services, such as accounting or engineering or legal or landscaping or other work, sand gravel, and firewood and timber, and anything else of value. It also includes the right to have government affairs administered impartially, and to receive the benefits of permits or other lawful applications to planning boards or building inspectors or zoning boards".....

"Because the district Court's charge, when read as a

whole, included the idea that the use of economic loss is wrongful when it is used to obtain property to which one is not entitled, there was no plain error."

The grounds stated by the 2nd circuit in its dismissal of the Petitioners RICO claim also appears to be at odds with the Supreme Court's opinion in National Organization for Women v Scheidler, 510 US 249, (1993) which held: "(1). The clinics have standing to bring their claim. Since their complaint was dismissed at the pleading stage, the complaint must be sustained if relief could be granted under any set of facts that could be proved consistent with the allegations. Hishon v King & Spaulding, 467 US 69, 73. Nothing more than the Complaint's extortion and injury allegations are needed to confer standing at this stage." P.p 255-256 "RICO does not require proof that either the racketeering enterprise or the predicate acts of racketeering in sec. 1962 were motivated by an economic purpose."

The Supreme Court in Rotella v wood, 528 US 549, (2000) similarly held that the courts should regard RICO complaints with flexibility at the initial pleading stage: "Rotella has presented no case in which Rule 9 (b) has effectively barred a case like his, and he ignores the flexibility provided by Rule 11 (b) (3), allowing pleadings based on evidence reasonably anticipated after further investigation or discovery."

**THIS COURT'S RECENT RULING IN CAPERTON V MASSEY HAS PROVIDED NEW DIRECTION IN THE ASSESMENT OF RECUSAL MOTIONS. IT WOULD BE HIGHLY INSTRUCTIVE IF THIS COURT WOULD REVIEW A FEW RECUSAL MOTIONS WHICH CITE THE AUTHORITY OF MASSEY.**

The 2nd Circuit appears to have ignored the authority of Caperton v Massey in the course of denying the Petitioners' emergency motion for recusal. Petitioners argued Massey's "reasonable person standard" in their motion and based it upon on both sec. 455 and the 14th Amendment's due process

clause. The question now arises, can a recusal motion be brought solely on the provisions of the 14th amendment, outside of the provisions of Sec. 455.

## CONCLUSION

In light of the foregoing, the petitioners respectfully request that their Petition for Writ of Certiorari be granted and that the decision of the Court of Appeals Second Circuit be summarily reversed.

Dated: March 2, 2018

Respectfully submitted,

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Appendix A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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MARGARET ZAVALIDROGA and TOMAS ZAVALIDROGA

Plaintiffs, 6:09-CV-225

vs

JOSEPH S. COTE, III, individually; JOHN DOE, a fictitious name intended to indicate individuals unknown at this time; JAMES E. KELLEY; DORIS M. KELLEY; DAVID LAPLANTE, individually as an Oneida County Sheriff's Deputy; GREGORY J. AMOROSO, Individually and Officially; and THE TOWN OF ANNSVILLE, A Municipal Entity,

Defendants

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*DAVID N. HURD*
United States District judge

## ORDER

Various motions have been made by the defendants to dismiss the complaint pursuant to fed. R. Civ. P. 12(b)(6), for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted (Docket Nos. 17, 41, and 44). Plaintiffs cross move for permission to serve a second amended complaint (Docket No. 48). Plaintiffs also oppose the defendants' motions (Docket Nos. 49, 54, and 59). Defendants have opposed the motion to amend (Docket No. 57).

Upon a review of all fillings, it is clear that there is no subject matter jurisdiction for any of the plaintiffs' federal claims. In fact, those claims are frivolous. Supplemental jurisdiction over the state law claims is declined.

The motion for a second amended complaint is moot.

Therefore, it is ORDERED, that

1. The complaint is DISMISSED;
2. The federal claims are dismissed with prejudice;
3. The state law claims are dismissed without prejudice; and
4. The motion to amend is DENIED.

The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

Dated: January 19, 2010
Utica, New York

United States District Judge

Appendix B

NORTHERN DISTRICT OF NEW YORK

**JUDGMENT IN A CIVIL CASE**

**MARGARET ZAVALIDROGA and TOMAS ZAVALIDROGA,**

**Plaintiffs,**

**vs.** **CASE NUMBER: 6:09-CV-0225 (DNH/ATB)**

**JOSEPH S. COTE, lll, Individual; JOHN DOE, A fictitious name intended to indicate individuals unknown at this time; JAMES E. KELLEY; DORIS M. KELLEY; DAVID LaPLANTE, Individually and Officially as an Oneida County Sheriff's Deputy; GREGORY J. AMOROSO, Individually, and Officially; and THE TOWN OF ANNSVILLE, A Municipal Entity,**

**Defendants.**

**Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the complaint is DISMISSED; the federal claims are dismissed with prejudice; the state law claims are dismissed without prejudice; and the motion to amend is

DENIED.
All of the above pursuant to the order of the Honorable Judge David N. Hurd, dated the 19th day of January, 2010.

DATED: January 19, 2010

Clerk of Court

S /S. Evans
Deputy Clerk

Entered on Docket: 1/19/2010 se
Date By

1. The complaint is DISMISSED;
2. The federal claims are dismissed with prejudice;
3. The state law claims are dismissed without prejudice; and
4. The motion to amend is DENIED.

The Clerk is directed to enter judgment accordingly.
IT IS SO ORDERED.

Dated: January 19, 2010
Utica, New York.

United States District Judge

10-0492-cv
Margaret Zavalidroga and Tomas Zavalidroga v. Joseph S. Cote, Individually, et al.

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**
**SUMMARY ORDER**

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERED BY THIS COURT'S LOCAL RULE 32.1.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1 WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.**

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At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 6th day of October, two thousand and ten.

Present: ROSEMARY S. POOLER,
PETER W, HALL, *Circuit Judges*,
MARK R. KRAVITZ, *District Judge*.

MARGARET ZAVALIDROGA, TOMAS ZAVALIDROGA,
*Plaintiffs-Appellants*,
10-0492-cv

-v-

JOSEPH S. COTE, individually, JOHN DOE, DORIS M. KELLEY, JAMES E. KELLEY, DAVID LAPLANTE, individually and officially as an Oneida County Sheriff's deputy, GREGORY J. AMOROSO,

individually and officially, TOWN OF ANNSVILLE, a municipal entity,

*Defendants-Appellees.*

---

FOR APPELLANTS:

Margaret Zavalidroga, pro se, Blossvale, New York.
Tomas Zavalidroga, pro se, Webb, New York

---

*Mark R. Kravitz, of the United States District Court of the District of Connecticut, sitting by designation

FOR APPELLEES:

Bartle J. Gorman, Gorman, Waszkiewicz, Gorman & Schmidt, Utica, NY, *for Appellee David LaPlante.*

Christopher B. Weldon and Darren P. Renner, Keidel, Weldon & Cunningham, LLP, White Plains, NY, *for Appellee Joseph S. Cote.*

Michael P. Collins, Bond, Schoeneck & King, PLLC, New York, NY; John G. McGowan, Bond, Schoeneck & King, PLLC, Syracuse, NY, *for Appellees Doris M. Kelley and James E. Kelley.*

Matthew D. Gumaer, Sugarman, Wallace, Mannheim & Schoenwald, LLP, Syracuse, NY, *for Appellee Gregory J. Amoroso.*

Carter h. Strickland, Mackenzie Hughes LLP, Syracuse, NY, *for Appellee Town of Annsville.*

**UPON DUE CONSIDERATION**, it is hereby **ORDERED, ADJUDGED, AND DECREED** that the District Court's judgment is **AFFIRMED.**

Plaintiffs-Appellants Margaret and Tomas Zavalidroga, pro se, appeal from the January 19, 2010 Order of the United States District Court for the Northern District of New York (Hurd, J.) dismissing the Zavalidrogas' First Amended Complaint. After the Zavalindrogas' neighbors successfully sued in state court for the rights to a pond and

adjacent property, the Zavalindrogas brought the current federal action against their neighbors, their own and their neighbors' attorneys in the state court action, two state court judges, a Sheriff's deputy, and the Town of Annsville, alleging a "state-sponsored scheme" to convey the Zavalindrogas' property to their neighbors. The Zavalindrogas request that we overturn the District Court's dismissal of their complain. In addition, Defendant-Appellee the Town of Annsville moves to dismiss the appeal on the basis that the Zavalindrogas abandoned on appeal their claims again the Town. We assume the parties' familiarity with the underlying facts, procedural history, and issues presented on appeal.

As a preliminary matter, we deny the Zavalidrogas' motion for the recusal of all three judges on this panel. Title 28 of the United States Code, Section 455, lists the circumstances in which a judge must disqualify herself if her "impartiality might reasonably be questioned." This panel's impartiality cannot reasonably be questioned. The Zavalidrogas allege that Judge Pooler knows of one of the defendants, who is a Syracuse attorney; the New York judges who heard the earlier state court action; and the district court judge below. Appellants have alleged no relationship between any of the judges on this panel and a defendant or person connected to this case that would cause anyone to reasonably question this panel's impartiality. See United States v. Pitera, 5 F.3d 624m 626 (2d Cur, 1993) (defining standard under Section 455 (a)).

Further, under Section 455 (b), Appellants allege no facts regarding "personal bias or prejudice" concerning a party of personal knowledge of the events in dispute. 28 U.S.C. § 455 (b)(1). Nor did any member of this panel serve as a lawyer in this matter or practice law with a lawyer who was litigating this matter. § 455(b)(2). Nor did any member of this panel, while serving as a government employee, participate in this matter as counsel, advisor, or witness or express an opinion about its merits. § 455(b)(3). Nor do any of the panel members have a family relationship or financial interest on which his or her impartiality might reasonably be questioned. § 455(b)(4), (b)(5).

Lastly, we have a duty to our fellow panel members, the Court at large, and the public to not casually recuse ourselves when a party makes general and unsupported allegations about our impartiality. We deny the Zavalidrogas' motion seeking recusal.

Turning to the merits of the appeal, we first consider the Town's

motion to dismiss the appeal. We find that the Zavalidrogas abandoned their claims against the Town of Annsville on appeal. The Zavalidrogas did not list the Town as a defendant in the caption of their appellate briefs; they referred to the Town as a "former Defendant[ ]; and they did not raise any arguments on appeal relating to the Town. *See LoSacco V. City of Middletown*, 71 F.3d 88, 92-93 (2d Cir. 1995) (finding that issues not raised in pro se brief were abandoned). The town's motion to dismiss the appeal is denied as moot.

As to the other appellees, this Court reviews *de novo* a district court decision dismissing a complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) or (b)(6). See *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (Rule 12(b)(1));*Chambers v. time Warner, Inc.* 282 F.3d 147, 152 (2d Cir. 2002) (Rule 12 (b)(6)). In each instance, this Court "construe[s] the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Chambers*, 282 F.3d at 152; see also *Triestman*, 470 F.3d at 474.

A district court may dismiss a complaint sua sponte for failure to state a claim, so long as the plaintiff is given notice and an opportunity to be heard. *Wachtler v. County of Herkimer*, 35 F.3d 77, 82 (2d Cir. 1994). Further, we may "affirm a decision on any grounds supported in the record, even if it is not one on which the trial court relied." *Thyroff v. Nationwide Mut., Ins. Co.*, 460 F.3d 400, 405 (2d Cir. 2006).

We affirm the district court's dismissal of the complaint because, even when liberally construed, the complaint failed to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

The Zavalidrogas did not plead sufficient facts to state a plausible claim for relief under 42 U.S.C. § 1981. The Zavalidrogas' allegations of discriminatory intent were wholly compulsory. See *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087-88 (2d Cir. 1993) (finding allegations were insufficient to state a claim under § 1981 where plaintiff failed to "offer more than conclusory allegations that he was discriminated

against because of his race").

Further, the Zavalidrogas failed to state a claim under 42 U.S.C. § 1983 against the Zavalidrogas' neighbors and the attorneys involved in the state litigation. Although private actors are liable under Section 1983 if they conspired with state officials, to state a claim based on "a section 1983 if they conspired with state officials, to state a claim based on "a section 1983 if they conspired with state officials, to state a claim based on "a section 1983 if they conspired with state officials, to state a claim based on "a section 1983 conspiracy theory, the complaint must allege facts demonstrating that the private entity acted in concert with the state actor to commit an unconstitutional act." *Spear v. town of West Hartford*, 954 F.2d 63, 68 (2d Cir. 1992). The Zavalidrogas' vague conspiracy allegations do not meet this standard. *See Ciambriello v. County of Nassau*, 292 F.3d 307, 324 (2d Cir. 2002) ("A merely
conclusory allegation that a private entity acted in concert with a state actor does not suffice a state a § 1983 claim against the private entity"); see also *Sommer v. Dixon*, 709 F.2d 173, 175 (2d Cir. 1983) ("A complaint containing only conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss"). Further, although David LaPlante is a state actor, the allegations against him did not state a constitutional deprivation.

Nor did the Zavalidrogas state a claim under the Racketeer Influence and Corrupt Organizations Act. A plaintiff alleging a civil RICO violation must allege: "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce." *Moss v. Morgan Stanley Inc.* , 719 F.2d 5, 17 (2d Cir. 1983). The Zavalidrogas failed to allege sufficient facts constituting a pattern of racketeering activity. See 18 U.S.C. § 1961 (1) (defining "racketeering activity").

In sum, the Zavalidrogas' First Amended Complaint stated no federal claims for relief. Further, the District Court did not err in denying the Zavalidrogas, pro se litigants, an opportunity to file another amended complaint. Although a district court generally should not dismiss a pro see complaint without granting the plaintiff leave to amend, dismissal is appropriate if leave to amend would be futile. *See Cuoco V. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000). Here, leave to

## AFFIDAVIT OF MAILING SERVICE

STATE OF NEW YORK
COUNTY OF ONEIDA ss.:

I, Anthony Marasco, being duly sworn, says: I am not a party to the action, am over 18 years of age, and reside in Rome, NY. on the 4th day of March, 2011, I served by First Class U.S. mail three copies each of Petitioners' revised Writ of Certiorari to the following individuals:

Christopher Weldon, 925 Westchester Ave, Suite 400, White Plains, N.Y. 10604

Matthew Gumaer, Sugarman, Wallace law Firm, 211 W. Jefferson St., Suite 20 Syracuse, NY 13202

Bartle Gorman, 1508 Genesee St. Utica NY 13502-5178

John McGowan, Bond, Schoeneck, King, 1 Lincoln Center, Syracuse, NY 13202

Signature Anthony Marasco

Sworn to before me this 4th day of March, 2011 Lori F. Campbell

LORI F. CAMPBELL
Notary Public, State of New York
Qual. in Oneida Co. #01CA5054558
My Commission Expires Oct. 10, 20 13

## CERTIFICATE OF COMPLIANCE

Margaret and Tomas Zavalidroga,

Petitioners

v

Joseph S. Cote, John Doe, Doris M. Kelley
James E. Kelley, David LaPlante, and
Gregory J. Amoroso,

Respondents

As required by Supreme Court Rule 33.1 (h), I certify that the petition for a writ of certiorari contains 3168 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1 (d) .

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 3, 2011

Margaret Zavalidroga

amend would be futile because not even "a liberal reading of the complaint gives any indication that a valid claim might be stated." *Id.* (upholding denial of leave to replead because complaint, even when read liberally, did not "suggest [ ] that the plaintiff has a claim that she has inadequately or in artfully pleaded and that she should therefore be given a chance to reframe").

Finally, because the District Court properly dismissed all claims over which it had original jurisdiction, the District Court did not err by declining to exercise supplemental jurisdiction over the Zavalidrogas' state law legal malpractice claim. *See* 28 U.S.C. § 136(c)(3).

We have considered all of the Zavalidrogas' arguments and find them to be without merit. Accordingly, the judgment of the District Court is **AFFIRMED**. The Town of Annsville's motion to dismiss the appeal is **DENIED** as moot.

FOR THE COURT: Catherine O'Hagan Wolfe, Clerk